Supreme Court, U. S.
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80-621

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

STATE OF WASHINGTON, *Petitioner,*

v

SOLOMON HANTON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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October, 1980

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QUESTION PRESENTED

The sole question presented is whether the Due Process clause of the Fourteenth Amendment of the United States Constitution as interpreted in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970), requires the State in a Washington prosecution for first-degree manslaughter to bear the burden of proving the absence of self-defense beyond a reasonable doubt.

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STATE OF WASHINGTON, *Petitioner,*

v

SOLOMON HANTON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner, the State of Washington, requests that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Washington entered in this proceeding on August 7, 1980.

OPINIONS BELOW

The opinion of the Washington Supreme Court in *State v. Hanton,* 94 Wn.2d 129, ... P.2d..... (1980), *motion for reconsid. pend.,* appears in the appendix as Appendix A. The unpublished opinion of the Court of Appeals for the State of Washington, Di-

vision I, Cause No. 5959-I, appears in the appendix as Appendix B.

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on August 7, 1980. This petition for certiorari was filed within 60 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

U.S. CONST. Amendment V

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

U.S. CONST. Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code 9A.32.060

> MANSLAUGHTER IN THE FIRST DEGREE
> (1) A person is guilty of manslaughter in the first degree when:
> (a) He recklessly causes the death of another person . . . .

Wash. Rev. Code 9A.08.010

GENERAL REQUIREMENTS OF CULPABILITY.

(1) Kinds of Culpability Defined.

* * * * *

(c) *Recklessness.* A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

Wash. Rev. Code 9A.16.050

HOMICIDE—BY OTHER PERSON—WHEN JUSTIFIABLE.

Homicide is also justifiable when committed . . . :

(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished.

STATEMENT OF THE CASE

a. Facts of the Incident

On February 25, 1977, at about 6:30 p.m. the victim, a 62-year-old man named Albert Proctor, and the defendant, Solomon Hanton, were driving in their automobiles at the intersection of the Bellevue-Redmond Road and 140th Avenue in Bellevue, Washington. Hanton's vehicle was in the right-hand turn lane and the victim's car in the through lane on 140th. When the stop light turned green, Hanton

did not turn right but proceeded through the intersection and cut sharply in front of the victim's car, forcing Proctor to brake suddenly to avoid a collision. Proctor followed the defendant's car to the next intersection about one-half mile away. As the cars stopped at a red light, Proctor left his vehicle and approached the defendant's car from the rear. Proctor hit the rear window of the Hanton's car with his fist. He then opened Hanton's car door and grabbed the defendant's shoulder, apparently trying to pull Hanton from the car.

Hanton was armed with a .380 caliber automatic pistol. He drew his weapon and, after a brief pause, fired one shot point-blank, striking Proctor in the upper lip. The bullet lodged in Proctor's left rear skull. Proctor never regained consciousness. He died on March 1, 1977, as a result of the gunshot wound to the head. Hanton claimed that he killed Proctor in self-defense.

The State charged Hanton with the crime of manslaughter in the first degree, alleging that the dedendant's use of force was recklessly excessive.

b. Procedure

Solomon Hanton was charged with the crime of manslaughter in the first degree, while armed with a deadly weapon and a firearm. On May 17, 1977, the jury found Mr. Hanton guilty as charged. On August 24, 1977, Hanton was sentenced to a term of up to ten years in prison.

Hanton appealed his conviction, claiming error in the court's refusal to give his requested instruction on self defense:

> When a defendant claims he killed another in defense of his person or property, the burden is

> upon that defendant only to produce some evidence, no matter how slight, tending to prove that the homicide was done in self-defense. It is not necessary for the defendant to prove this to you beyond a reasonable doubt, nor by a preponderance of the evidence. The defendant sustains this burden of proof, if from a consideration of the evidence in the case you have a reasonable doubt as to whether or not the killing was done in self-defense. *It is the duty of the state to prove beyond a reansonable doubt the lack of self-defense.*

(Emphasis added.)

Hanton claimed that the instruction given instead unconstitutionally placed the burden of persuasion of self-defense on the defendant. The court gave the following instruction (No. 13):

> When the defendant claims he killed another in defense of his person or property, the burden is upon that defendant only to produce some evidence tending to prove that the homicide was done in self-defense. It is not necessary for the defendant to prove this to you beyond a reasonable doubt, nor by a preponderance of the evidence. The defendant sustains this burden of proof, if from a consideration of the evidence in the case you have a reasonable doubt as to whether or not the killing was done in self-defense.

Holding that the instruction given properly informed the jury of the law in Washington State, the Court of Appeals for the State of Washington, Division I, affirmed the conviction in an unpublished opinion (Appendix B).

Defendant petitioned the Supreme Court of the State of Washington for discretionary review. In an opinion announced August 7, 1980, the Supreme Court of the State of Washington reversed the de-

cision of the Court of Appeals and ordered a new trial (Appendix A). The court reasoned that because the State had the duty to prove the element of recklessness beyond a reasonable doubt and because the statutory definition of "reckless" included the word "wrongful," the State "must bear the burden of proving the absence of self-defense, beyond a reasonable doubt." *State v. Hanton,* 94 Wn.2d at 133. The Supreme Court therefore concluded that the trial court erred in giving instruction No. 13.

REASONS FOR GRANTING THE WRIT

I. The Opinion of the Court Below Conflicts With *Patterson v. New York,* 432 U.S. 197 (1977).

The decision below is in direct conflcit with *Patterson v. New York,* 432 U.S. 197 (1977).

In *Patterson* the United States Supreme Court held: (1) that the State legislature is constitutionally permitted to allocate to the defendant the burden of proving affirmative defenses like self-defense; (2) that a New York law requiring the defendant to prove an affirmative defense did not deny due process to the defendant; and (3) that *Mullaney v. Wilbur,* 421 U.S. 684 (1975), and *In re Winship,* 397 (1970), did not require the State to assume the burden of proving the absence of an affirmative defense. More recently the Supreme Court has held that the Constitution does not require the prosecution to disprove a negative such as insanity. *Addington v. Texas,* 441 U.S. 418 (1979).

Historically the State has not been required to disprove the existence of affirmative defenses as elements of the crime. Rather, at common law the burden of proving " 'all . . . circumstances of justi-

fication, excuse or alleviation'—rested on the defendant. 4 W Blackstone, *Commentaries* 201; M. Foster, *Crown Law* 255 (1762)." *Patterson v. New York,* 432 U.S. at 2323. See also F. Wharton, *A Treatise on the Law of Evidence in Criminal Issues* 240-69 (9th Ed. 1884); H. Kelly, *Criminal Law and Practice,* 124-28, 131 (1876), cited at n. 7, *id.*

The Washington State legislature set out in RCW 9A.16 a number of affirmative defenses, including self-defense, which traditionally have been the burden of the defendant to prove. Consistent with Washington law the Washington Court of Appeals held in the instant case that the absence of self-defense is not an element of the crime of manslaughter. (See Appendix B.) But the Washington Supreme Court reversed, holdng that the instruction given unconstitutionally shifted the burden of proving self-defense to the defendant, denying him due process of law under *Mullaney v. Wilbur, supra,* and *In re Winship, supra.*

Petitioner State submits that the *Hanton* court has either totally misread or completely ignored the holding of *Patterson.* Neither *Patterson, Mullaney,* nor *Winship* hold that the Constitution requires the State to disprove self-defense. Review of this Washington Supreme Court decision should be granted in order to correct this misapplication of federal constitutional law.

II. The Decision of the Washington State Supreme Court Conflicts With Decisions of Federal Courts of Appeals.

The Washington Supreme Court in *Hanton* not only misconstrues the controlling precedent of *Mullaney v. Wilbur, supra,* and *Patterson v. New York,*

supra, but also ignores strong federal authorities which have correctly applied the holdings of these United States Supreme Court cases.

Federal Circuit Courts of Appeal have held that *Patterson* and *Mullaney* do not require negative burdens of proof to be placed on the prosecution. In *United States ex rel. Goddard v. Vaughn,* 614 F.2d 929; 931 (3rd Cir. 1980), the Third Circuit dispelled the confusion caused by the circular reasoning of the type exhibited in the *Hanton* opinion. Examining *In re Winship, supra, Mullaney v. Wilbur, supra,* and *Patterson v. New York, supra,* the Third Circuit in *Vaughn* found that once an affirmative defense (intoxication) had been raised by the defendant, the prosecutor did not thereby acquire an additional duty to prove its absence. The *Vaughn* court made clear that what is constitutionally prohibited by *Mullaney* is to prove one fact and then from that proven fact merely to *presume* an essential element of the crime. There is no presumption issue involved in *Hanton.*

The Sixth Circuit Court of Appeals in *Krzeminski v. Perini,* 614 F.2d 121 (6th Cir. 1980), also held that it was proper in a homicide case to place the burden of proving affirmative defenses, specifically insanity and "sudden anger," upon the defendant. In rejecting defendant's claim that placing burdens of proof upon him violated due process, the *Krzeminski* court stated:

> Petitioners claim [that an affirmative defense must be disproved beyond a reasonable doubt by the State] is foreclosed by *Patterson v. New York,* 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). *Patterson* makes it clear that so long as a jury is instructed that the state has the burden of proving every element

> of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant. *Patterson, supra; Hankerson v. North Carolina,* 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977); *Rivera v. Delaware,* 429 U.S. 877, 97 S. Ct. 226, 50 L. Ed. 2d 160 (1976) ....

Krzeminski v. Perini, supra, 614 F.2d at 123.

III. There Is a Split of Authority Among the Circuit Courts of Appeals.

In conflict with the decisions of the Third Circuit Court of Appeals in *Goddard v. Vaughn, supra,* and the Sixth Circuit in *Krzeminski v. Perini, supra,* are decisions of the Seventh Circuit in *United States v. Jackson,* 569 F.2d 1003 (7th Cir. 1978) and the Tenth Circuit in *United States v. Corrigan,* 548 F.2d 879 (10th Cir. 1977). Relying on *Mullaney v. Wilbur, supra,* the Seventh Circuit noted in *Jackson, supra,* 569 F.2d 1088, n.12, that if a criminal defendant had property objected, it would have been reversible error for the trial court to fail to instruct the jury that the government bore the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. Similarly the Tenth Circuit in *Corrigan, supra,* 548 F.2d at 883-884, held that it was reversible error to give instructions which permitted the jurors to infer that the burden of proof on the issue of self-defense was on the defendant.

Because the type of circular reasoning in which the *Hanton* court engaged is gaining popularity, the consequences are not confined solely to the state of

Washington.[1] As noted in *Porter v. Leeke,* 475 F. Supp. 253, 259 (D.S.C. 1978), ultimately the United States Supreme Court will be required to settle the "maelstrom" generated by its opinions in *Patterson* and *Mullaney*. The issue is ripe for settlement of the "maelstrom" in the instant case.

---

1. See *Holloway v. McElroy,* 474 F.Supp. 1369 (M.D. Ga. 1979); *Porter v. Leeke,* 457 F.Supp. 253 (1978); *People v. Allen,* 76 Cal. App. 3d 748, 143 Cal. Rptr. 164 (3rd Dist. 1978); *People v. Banks,* 67 Cal. App. 3d 379, 137 Cal. Rptr. 652 (3rd Dist. 1976); *Squire v. State,* 280 Md. 132, 368 A.2d 1019 (1977); *Commonwealth v. Collins,* 373 N.E. 2d 969 (S. Ct. Mass. 1978); *State v. Columbus,* 258 N.W. 2d 122 (S. Ct. Minn. 1977); *State v. Rowe,* 33 N.C. App. 611, 235 S.E. 2d 873 (1977); *Commonwealth v. Lynch,* 477 Pa. 390, 383 A.2d 1263 (1978); *Commonwealth v. Lesher,* 473 Pa. 141, 373 A.2d 1088 (1977).

CONCLUSION

The Washington State Supreme Court in *Hanton* not only ignored the Third and Sixth Circuits' opinions in *Vaughn* and *Krzeminski,* but more importantly misapplied this Supreme Court's opinion in *Patterson v. New York.* Based upon misconceptions of federal and constitutional law the Washington Supreme Court has erroneously allocated to the prosecution the burden of proving the absence of self-defense beyond a reasonable doubt. Moreover, there is a split of authority among the lower federal courts on this issue.

For these reasons a writ of certiorari to the Supreme Court of Washington should issue.

Respectfully submitted,

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King County Prosecuting Attorney

By LEE D. YATES
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Senior Deputy Prosecuting Attorney
Attorneys for Respondent

APPENDICES

APPENDIX A

[No. 46360. En Banc. August 7, 1980.]

THE STATE OF WASHINGTON, *Respondent*, v. SOLOMON HANTON, *Petitioner*.

[1] **Criminal Law — Evidence — Burden and Degree of Proof — In General.** Under the due process clause, the State must prove each element of the crime charged beyond a reasonable doubt.

[2] **Homicide — First Degree Manslaughter — Self-Defense — Burden and Degree of Proof.** In a prosecution for first degree manslaughter, the State has the burden of proving the absence of self-defense beyond a reasonable doubt.

[3] **Homicide — First Degree Manslaughter — Self-Defense — Instructions.** Generally, no self-defense instruction need be given in a first degree manslaughter prosecution if the jury is instructed on the elements of recklessness. If the defendant raises an issue of self-defense by sufficient evidence, a self-defense instruction must be given but it need not allocate the burden of proof.

Nature of Action: Prosecution for manslaughter in the first degree. The victim, who had been angered by the defendant's driving, was shot as he attempted to pull the defendant out of his automobile. The defendant claimed self-defense.

Superior Court: The Superior Court for King County, No. 80635, David C. Hunter, J., on August 24, 1977, entered a judgment on a verdict of guilty.

Court of Appeals: The court *affirmed* the judgment in an unpublished opinion noted at 23 Wn. App. 1004.

Supreme Court: Holding that the trial court's instructions improperly placed the burden of proving self-defense upon the defendant, the court *reverses* the conviction.

Edwards & Barbieri, by *Charles K. Wiggins* and *Malcolm L. Edwards*, for petitioner.

Norm Maleng, Prosecuting Attorney, and *Lee D. Yates, Senior Deputy*, for respondent.

WILLIAMS, J.—Petitioner Solomon Hanton seeks review of a jury conviction of first degree manslaughter while armed with a deadly weapon. The Court of Appeals affirmed the conviction in an unpublished opinion. We reverse the Court of Appeals and remand the case for a new trial.

Petitioner and the victim were driving their respective automobiles in Bellevue, Washington, on February 25, 1977. While leaving an intersection, petitioner pulled in front of the victim's car in such a manner as to cut him off, causing him to apply his brakes to avoid an accident. This apparently made the victim quite angry, for he followed close behind petitioner's car until they stopped at the next stoplight. There the victim left his car, came up to petitioner's car, opened the door, and attempted to pull him out. Petitioner thereupon drew a pistol and shot him. He died several days later as a result of the wound.

Petitioner was charged with and convicted of first degree manslaughter. RCW 9A.32.060(1)(a). At trial he requested the following instruction on self-defense:

> When a defendant claims he killed another in defense of his person or property, the burden is upon that defendant only to produce some evidence, no matter how slight, tending to prove that the homicide was done in self-defense. It is not necessary for the defendant to prove this to you beyond a reasonable doubt, nor by a preponderance of the evidence. The defendant sustains this burden of proof, if from a consideration of the evidence

in the case you have a reasonable doubt as to whether or not the killing was done in self-defense.

It is the duty of the State to prove beyond a reasonable doubt the lack of self-defense.

The court gave the following instruction:

When a defendant claims he killed another in defense of his person or property, the burden is upon that defendant only to produce some evidence tending to prove that the homicide was done in self-defense. It is not necessary for the defendant to prove this to you beyond a reasonable doubt, nor by a preponderance of the evidence. The defendant sustains this burden of proof, if from a consideration of the evidence in the case you have a reasonable doubt as to whether or not the killing was done in self-defense.

Instruction No. 13.

On appeal, petitioner argued that the instruction as given unconstitutionally placed on him the burden of proving self-defense and that such an allocation of the burden had been disapproved by this court in *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977). The Court of Appeals rejected the applicability of this reasoning to homicide offenses under the new criminal code, RCW 9A.32, relying on *State v. Bradley*, 20 Wn. App. 340, 581 P.2d 1053 (1978).

We agree with petitioner that the effect of the challenged instruction was to shift to petitioner the burden of proof on self-defense. The instruction as given was substantially the same as the one at issue in *Roberts*. We found that instruction defective because it impermissibly shifted the burden to the accused. *See also State v. Kroll*, 87 Wn.2d 829, 839-40, 558 P.2d 173 (1976). The same shift in the allocation of the burden occurred here. Therefore, the only question here is whether the burden may be allocated to an accused under the present statute.

[1] We begin by noting that the due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime with

which an accused is charged. *Mullaney v. Wilbur*, 421 U.S. 684, 685, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975); *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Roberts*, 88 Wn.2d 337, 340, 562 P.2d 1259 (1977). This principle has been reaffirmed recently by the United States Supreme court in *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39, 48, 99 S. Ct. 2450 (1979). *See also Patterson v. New York*, 432 U.S. 197, 206–07, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

[2] In order to determine which facts the prosecution must prove beyond a reasonable doubt, it is necessary to analyze each element of the crime charged. The Court of Appeals cited *State v. Bradley, supra*, in support of its holding that absence of self–defense is not an element of a *homicide offense* under the new criminal code and that the State may therefore impose on an accused the burden of proving it. But the court did not analyze the elements of the crime of manslaughter either in *Bradley* or in the present case. Since murder and manslaughter are clearly separate homicide offenses under the statutory scheme, we must analyze *each* element of first degree manslaughter in our consideration of petitioner's claim.

RCW 9A.32.060(1)(a) states, in pertinent part:

> (1) A person is guilty of manslaughter in the first degree when:
> (a) He recklessly causes the death of another person
> . . .

Since recklessness is expressly made an element of the crime of first degree manslaughter, the prosecution must prove it beyond a reasonable doubt. *State v. Roberts, supra*. The statute provides:

> (c) *Recklessness.* A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1)(c).

Self–defense is explicitly made a lawful act by at least two provisions of the criminal code. First, homicide is justifiable when committed either:

> (1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
>
> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.

RCW 9A.16.050(1) and (2). Moreover, use of force is not unlawful when used "by a party about to be injured . . . in preventing or attempting to prevent an offense against his person". RCW 9A.16.020(3).

A person acting in self–defense cannot be acting recklessly as that term is defined in RCW 9A.08.010(1)(c). There can be no recklessness without disregard of risk of a wrongful act, and self–defense, as defined, is not "wrongful." Moreover, since self–defense is not wrongful, it cannot be "a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW 9A.08-.010(1)(c).

In short, an action taken in self–defense is inconsistent with the statutory definition of recklessness. Since proof of self–defense negates the element of recklessness in first degree manslaughter, requiring an accused to prove self–defense places on him or her the burden of proving absence of recklessness. Such a result is proscribed by *Winship* and *Mullaney*. Accordingly, we hold that in a prosecution for first degree manslaughter the State must bear the burden of proving absence of self–defense beyond a reasonable doubt. This conclusion makes it unnecessary to consider petitioner's statutory construction argument that the legislature intended to place the burden on the State.

[3] It does not necessarily follow, however, that the court must instruct the jury that the burden of proof on self-defense rests on the prosecution. When recklessness is an element of the crime charged, and the court properly instructs the jury on the elements of recklessness, the jury must determine, before it may convict, that the accused knew of and disregarded a substantial risk that a wrongful act would occur and that such disregard was a gross deviation from the conduct of a reasonable person in the same situation. Such a finding is totally inconsistent with self-defense. A person acting in self-defense cannot be acting recklessly. Thus, if the jury is able to find that a defendant acted recklessly, it has already precluded a finding of self-defense. We hold, therefore, that an instruction allocating the burden of proof to the State to disprove self-defense is not necessary when there is adequate instruction on the elements of recklessness. *See* WPIC, 11 Wash. Prac. 100, 102-03 (1977); *People v. Fink*, 194 Colo. 516, 574 P.2d 81 (1978); Colorado Jury Instructions (Criminal) § 9:7 (1974).

If a defendant presents sufficient evidence to raise an issue of self-defense, the court need only instruct on it without allocating the burden of proof. Such an instruction permits a defendant to fully argue his theory of the case. *State v. King*, 92 Wn.2d 541, 546, 599 P.2d 522 (1979). The jury may then consider the evidence of self-defense in determining whether a defendant was acting recklessly.

We reverse and remand for a new trial.

UTTER, C.J., and ROSELLINI, STAFFORD, WRIGHT, BRACHTENBACH, HOROWITZ, DOLLIVER, and HICKS, JJ., concur.

APPENDIX B

FILE
IN CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON - DIVISION I
DATE April 2, 1979
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 5959-I
v.	)	DIVISION ONE
SOLOMON HANTON, Appellant.	)	FILED APR 2 1979

RINGOLD, J.-- Solomon Hanton was convicted of manslaughter in the first degree under RCW 9A.32.060. At trial, Hanton argued self-defense and requested the court to instruct the jury that:

> When a defendant claims he killed another in defense of his person or property, the burden is upon that defendant only to produce some evidence, no matter how slight, tending to prove that the homicide was done in self-defense. It is not necessary for the defendant to prove this to you beyond a reasonable doubt, nor by a preponderance of the evidence. The defendant sustains this burden of proof, if from a consideration of the evidence in the case you have a reasonable doubt as to whether or not the killing was done in self-defense. It is the duty of the state of prove beyond a reasonable doubt the lack of self-defense.

The trial court gave substantially the same instruction but deleted the last sentence. Hanton appeals arguing that the court erred in so doing because State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977) requires the State to prove lack of self-defense beyond a reasonable doubt where a defendant is charged and convicted of manslaughter under RCW 9A.32.060. This argument was considered and rejected by Division Two in State v. Bradley, 20 Wn. App. 340, 581 P.2d 1053 (1978)

where the court stated at p. 343:

> As we have stated in recent decisions, Roberts does not apply to self-defense instructions in prosecutions for homicide and assault under the new criminal code. State v. Bruce, 19 Wn. App. 392, 576 P.2d 1324 (1978); State v. Atkinson, 19 Wn. App. 107, 575 P.2d 240 (1978). The definitions of these crimes in RCW Title 9A make it constitutionally permissible for the state to assign defendant the burden of persuasion on the matter of self-defense. See Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

State v. Bradley, supra, is controlling and we affirm.

Affirmed.

This opinion will be filed for public record pursuant to RCW 2.06.040, as amended by the Laws of 1971, ch. 41, § 1, p. 63.

Ringold, J.

Swanson, J.